No. 83-1000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

J. D. COURT, INC., a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Congress, by passage of the Federal Tax Lien Act of 1966, intend to curtail or abrogate the application of the federal judicial doctrine of choateness and thereby protect perfected consensual state law security interests competing for priority with later filed notices of federal tax liens?

THE PARTIES

The Petitioner, J. D. Court, Inc., is a privately held corporation without parent, subsidiary or affiliate. The Respondent is the United States of America, acting through the Department of the Treasury, Internal Revenue Service.

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CITATION TO OPINIONS BELOW

The judgment on review was printed in a slip opinion issued by the Seventh Circuit Court of Appeals on July 5, 1983, and appears in the Federal Reporter at 712 F.2d 258. No opinions by the Trial Court were published. The Seventh Circuit's Opinion is reprinted in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Seventh Circuit filed its decision and entered judgment on July 5, 1983. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed and denied by the Court by Order entered September 21, 1983, and is reprinted in the Appendix to this Petition at A-14.

Petitioner believes jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C., Section 1254(1) and the Rules of this Court.

STATUTES INVOLVED

26 U.S.C., Section 6321 – Lien for Taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C., Section 6323 – Validity and Priority Against Certain Persons

(a) Purchasers, Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors. The lien imposed by Section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

STATEMENT OF FACTS

The Petitioner, J. D. Court, Inc., is the holder of a perfected security interest in the accounts of a federal taxpayer (Eventide Homes). The Security Agreement was assigned to the Petitioner by a prior holder (Mervin Beil), who perfected the security interest under the Illinois Uniform Commercial Code, Ill. Rev. Stat., Ch. 26, Section 9-401(c) by filing a Financing Statement with the Illinois Secretary of State's Office on May 17, 1979.

The taxpayer was certified by the Director of the Illinois Department of Public Aid to participate in the Title XIX Medicaid Program and was entitled to reimbursements from the Department for services rendered to public aid recipients. During 1979 and early 1980, the taxpayer was entitled to approximately $33,000.00 from the Department. The taxpayer became delinquent in federal taxes owed, and on September 17, 1979, the first of four tax lien filings were filed with the appropriate public office. On January 30, 1980, the Internal Revenue Service levied on the funds owed by the Department to the taxpayer and on February 15, 1980, the taxpayer was placed in receivership.

The Petitioner filed this action to enjoin the Government from levying on the funds owed the taxpayer by the Department under the reimbursement contract and for an adjudication of priority of liens. Both the Petitioner and the Government are entitled to sums from the taxpayer exceeding the amount of the funds for which the security interest and the tax lien compete. The funds are escrowed pending final adjudication of priority.

The trial court entered Summary Judgment for the Government on stipulated facts and adjudicated the later filed tax liens to prime the Petitioner's security interest, except for $907.38, which represented reimbursements for services provided by the taxpayer to public aid recipients during the 45 day period immediately following the date of the filing of the first tax lien notice.

The Court of Appeals affirmed the District Court. Both applied the judicial doctrine of choateness to defeat the state law security interest in favor of a later filed federal tax lien.

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

Jurisdiction in the District Court was conferred by the provisions of 26 U.S.C., Section 7426 and 28 U.S.C., Section 1346(3).

ARGUMENT

I.

REVIEW IS WARRANTED BY THIS COURT TO GIVE EFFECT TO THE CONGRESSIONAL POLICY OF RESTRICTING FEDERAL PRIORITY IN THE ENFORCEMENT OF TAX LIENS, TO PROMOTE THE COMMERCIAL CERTAINTY INTENDED BY THE CONGRESS BY THE PASSAGE OF THE FEDERAL TAX LIEN ACT OF 1966 AND THE STATE ENACTED UNIFORM COMMERCIAL CODES AND TO CONFORM THE ACT WITH THE CODES.

A federal tax lien is a secret lien. It arises upon the failure or neglect of a taxpayer to pay federal taxes when due. 26 U.S.C., Section 6321. As such, it lurks in the shadows of the commerce, preying on the positions and expectancies of private creditors of the taxpayer. The "choateness doctrine" originating from *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362 (1946), gave some protection to creditors who would demonstrate with certainty the identity of the lienor, the amount of the lien and the property subject to lien. The application of the doctrine required a factual adjudication of those attributes. The Congress, dissatisfied with the lot of private creditors in the application of the doctrine, passed the Federal Tax Lien Act of 1966 and set forth priorities of state law security interests in relation to the federal tax lien. 26 U.S.C., Section 6323(a). The Act clearly intended to render the tax lien ineffective during its covert existence as against specified private lienors. The judicial doctrine of choateness was employed in this case to deprive the Petitioner of the preferred lien status set forth in 26 U.S.C., Section 6323(a).

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), this Court addressed the question of priority of perfected private state law liens competing with consensual or contractual federal liens arising through governmental lending programs. In the absence of an express congressional directive, priority was held to be determined by nondiscriminatory state law. The decision in *Kimbell* recognized the function of the Court to ". . . effectuate congressional policy". 440 U.S. at 738. The Congressional policy behind the Federal Tax Lien Act of 1966 was found to be to:

> "improv(e) the status of private secured creditors" and prevent impairment of commercial financing transactions by "moderniz(ing) . . . the relationship to Federal tax liens to the interests of other creditors." 440 U.S. at 738, citing S. Rep. No. 1708, 89th Cong., 2nd Sess., 1-2 (1966), U.S. Code Cong. & Admin. News 1966, p. 3722; and H.R. Rep. No. 1884, 89th Cong., 2nd Sess., 35 (1966).

At n.40 of the opinion, the Court acknowledged that Section 6323(a) provides, "Holders of consensual security interests also receive priority over unrecorded tax liens." 440 U.S. at 738, n.41. Paragraph (a) of Section 6323 plainly states:

> The lien imposed by section 6321 shall not be valid as against any . . . holder of a security interest . . . until notice thereof . . . has been filed by the Secretary.

The Petitioner's security interest was filed and perfected four months *before* the first tax lien filing. The District Court and the Court of Appeals applied the judicially created doctrine of choateness to defeat the first-in-time, first-in-right position of the Petitioner's security interest.

The doctrine antedates the passage of the Tax Lien Act of 1966. *United States v. City of New Britain*, 347 U.S. 81 (1954). The Congress did not expressly abrogate the doctrine, but the House Reports on hearings prior to passage of the Act stated a purpose of the Act, "to conform the lien provisions of the Internal Revenue laws to concepts developed in the Uniform Commercial Code". H.R. 1884, 89th Cong., 2nd Sess.; 1966 U.S. Code Congressional and Administrative News 3722. In *Kimbell, supra*, this Court recognized that "businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved". 440 U.S. at 739. And this court held that "absent a congressional directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws". 440 U.S. at 740. Admittedly, the Court in *Kimbell* was not presented with a private lien competing with federal tax liens, rather a consensual government lien. We suggest however that the opinion correctly discerned the Congressional intention to disapprove "unrestricted federal priority in an area as important to the nation's stability as taxation. . . ." 440 U.S. at 738.

It has long been recognized that while federal law determines the priority of liens competing with federal tax liens, that state law determines the nature and extent of "property" and "rights of property". *Aquilino v. United States*, 363 U.S. 509 (1960). Therein, the Court stated:

> . . . in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute. *Morgan v. Com'r*, 309 U.S. 78, 82. Thus, as we held only two terms ago, Section 3670 "creates no property rights

> but merely attaches consequences, federally defined, to rights created under law . . . *United States v. Bess*, 357 U.S. 51, 55. (363 U.S. at 513.)

The Court of Appeals held that "until the accounts receivable actually came into existence, that is, at the time the services giving rise to the accounts receivable are performed", the security interest does not become "choate". The Uniform Commercial Code, as enacted by the State of Illinois, clearly disspells any requirement for performance as a prerequisite for the taxpayer's property to acquire "account" status:

> "account" includes ". . . any right to payment for . . . services rendered which is not evidenced by an instrument or chattel paper, *whether or not it has been earned by performance.*" (Emphasis added) Ch. 26, Ill. Rev. Stat., Section 9-106.

It was nowhere suggested by the Government that these provisions of state law operate in any fashion to discriminate to the prejudice of the national treasury.

The Petitioner suggests further that the erosion of the dominance of the federal tax lien is intended to create a more certain climate of commerce by recognizing the benefit conferred by private lenders in enhancing the estate of the taxpayer. The Court of Appeals for the Fifth Circuit in *Aetna Ins. Co. v. Texas Thermal Industries, Inc.*, 591 F.2d 1035 (5th Cir. 1979), stated:

> As the Treasury increased its reliance upon the tax lien as a method for collecting outstanding taxes, and as the financing world increasingly relied upon security interests in inventory and accounts receivable, the harshness of the choateness rule and the vagaries of its application in the tax lien context caused increasing confusion and generated increasing criticism. The Federal Tax Lien Act of 1966, as codified at 6323, represented a response to the problem. The purpose

> of the Act was, at least in large part, to "conform the lien provisions of the internal revenue laws to concepts developed in (the) Uniform Commercial Code." (Citing H.R. Rep. No. 1884, *supra.*) *We therefore conclude, and hold,* that whatever role the "choateness" rule of federal common law may play in other contexts, it has been supplanted by the provisions of Section 6323 with respect to tax lien priority questions as to which that statute provides an unambiguous federal law answer. (Emphasis added) 591 F.2d at 1038.

The Court in *Aetna,* faced with the question of whether the choateness test was satisfied, declined to apply it, saying, "That may or may not be the case, but the Congress spared us the necessity of engaging in the metaphysical analysis necessary to answer the question." 591 F.2d at 1038.

This Court recognized in *Kimbell,* that the Federal Tax Lien Act of 1966 "modified the Federal Government's preferred position under the choateness and first in time doctrines. . . ." 440 U.S. at 738. The extent of that modification is largely in doubt. Petitioner respectfully suggests that the drift and direction of the Court of Appeals decision is quite contrary to the Congressional intentions and policies recognized by this Court in *Kimbell.* The departure from the clear words of Section 6323(a) of the Act can only spawn litigation to elaborate the vagaries of the doctrine as it is being revived by the courts to pare away the grant of priority to holders of security interests.

Petitioner respectfully suggests the question is of immense importance to the commerce, to lenders and their counsel, who must rely on the legislated words of the Congress and the meanings attributed to them by the Courts. The Uniform Commercial Code has a prime purpose, "to make uniform the law among the jurisdictions". Model

Uniform Commercial Code, 9th Ed., The American Law Institute and National Conference of Commissioners on Uniform State Laws, Official Text-1978, West Publishing Co., Section 1-102; Ch. 26, Ill. Rev. Stat., Section 1-102. The Federal Tax Lien Act of 1966 was intended to conform federal lien provisions to Uniform Commercial Code concepts. H.R. Rep. 1884, *supra*.

Continued application of the doctrine to test perfected consensual liens undercuts what this Court in *Kimbell* recognized as "reliability of the notice filing system, which plays a crucial role in commercial dealings". 440 U.S. at 739, n.42. While the doctrine may be useful to test competing non-consensual liens, its application to consensual liens and security interest disrupts the commerce and thwarts commercial expectations.

II.

REVIEW IS WARRANTED TO RESOLVE APPARENT CONFLICTING FEDERAL COURT DECISIONS ADDRESSING THE APPLICATION OF THE JUDICIAL DOCTRINE OF CHOATENESS TO STATE LIENS COMPETING FOR PRIORITY WITH FEDERAL TAX LIENS.

There is a certain confusion recognized by the Court of Appeals as to the viability of the doctrine in the Fifth Circuit. (App. 1, p. 10, n.10) *Texas Oil and Gas Corp. v. United States*, 466 F.2d 1040 (5th Cir. 1972), cert. den., 410 U.S. 929 (1973), reaffirmed the doctrine of choateness. In 1979, without any reference to *Texas Oil*, the Fifth Circuit Court of Appeals decided *Aetna Ins., supra*, which clearly rejected the doctrine. In 1980, the Court rendered its opinion in *Rice Inv. Co. v. United States*, 625 F.2d 565 (5th Cir. 1980), and again gave at least a sputtering life to the doctrine. We submit that the mischief and uncertainties visited by the doctrine and its vagaries on

lenders and their counsel is evident. It appears that two conflicting rules obtain within the Fifth Circuit. It further appears that the Tenth Circuit has declined to apply the doctrine to security interests. *Manalis Finance Co. v. United States*, 442 F.Supp. 579 (C.D. Cal. 1977), aff'd. 611 F.2d 1270. *Consolidated Film Industries v. United States*, 403 F.Supp. 1279 (D. Utah 1975), rev'd. on other grounds 547 F.2d 533 (10th Cir. 1976). The Second Circuit, in *PPG Indus., Inc. v. Hartford Fire Ins. Co.*, 531 F.2d 58 (2nd Cir. 1976), did not apply the doctrine. In other Circuits no decisions were found at the Circuit level, but District Court decisions either expressly rejected the doctrine or have overlooked or ignored it. *Pine Builders, Inc. v. United States*, 413 F.Supp. 77 (E.D. Va. 1976); *George W. Ultch Lumber Co. v. Hall Plastering, Inc.*, 447 F.Supp. 1060 (W.D. Mo. 1979); *United States v. Cotier*, 403 F.Supp. 397 (DCNJ 1975); *United States v. Peoples Bank*, 375 F.Supp. 342 (E.D. Va. 1974); *Major Elec. Supplies, Inc. v. J.W. Pettit Co.*, 427 F.Supp. 752 (M.D. Fla. 1977).

This Court, in *Kimbell*, acknowledged the criticism of the doctrine for not only "frustrating private creditors expectations", but for "generating inconsistencies in application". 440 U.S. 739, n.42. The "adjustments" required by lenders to "protect against the stringent choateness requirements" (440 U.S. 739, n.42) are distinct elements of risk and uncertainty. Doubt and confusion as to application of the doctrine increases those risks and uncertainties exponentially. And the plain words of the Congress set forth in Section 6323(a) of the Federal Tax Lien Act take on the appearance of bait for a trap of the sovereign.

CONCLUSION

For each and all of the foregoing reasons, Petitioner respectfully requests this Court grant the Writ and enter an appropriate Order thereon.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2425

J. D. COURT, INC., a Corporation,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Acting through the DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE,

Defendants-Appellees.

In the United States District Court
For the Central District of Illinois, Danville, Division.
No. 80 C 2043—**Harold A. Baker**, *Judge.*

ARGUED JANUARY 12, 1983—DECIDED JULY 5, 1983

Before CUMMINGS, *Chief Judge*, COFFEY, *Circuit Judge*, and MORAN, *District Judge.**

COFFEY, *Circuit Judge.* This appeal involves a determination of the respective priority between a federal tax lien on a taxpayer's accounts receivable and a private individual's security interest in the same accounts receivable. The district court granted summary judgment in favor of the government finding that the federal tax lien was entitled to priority in all of the taxpayer's ac-

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* The Honorable James B. Moran, District Judge of the Northern District of Illinois, is sitting by designation.

counts receivable arising more than 45 days after the Internal Revenue Service first filed notice of its tax lien. We affirm.

I.

On June 20, 1977, the Director of the Illinois Department of Public Aid certified the taxpayer, Eventide Homes, Inc., to participate in the Title XIX Medicaid Program as a skilled and intermediate nursing care facility.[1] Eventide Homes' initial certification for participation in the Medicaid Program was effective from March 1977 through March 1978, and was later extended through 1980. Under the certification agreement between Eventide Homes and the Illinois Department of Public Aid, Eventide Homes was under no obligation to provide medical and health care services to public aid recipients of the State of Illinois, but if they decided to provide such care, the Department agreed to reimburse Eventide Homes.

On May 10, 1979, Eventide Homes gave a $75,000 promissory note for value to Mervin Beil and executed a security agreement granting Beil a security interest in the taxpayer's "accounts receivable, and all goods, equipment, fixtures or inventory now or hereafter existing" to secure payment of the promissory note. Beil perfected his security interest pursuant to Ill. Rev. Stat. ch. 26, § 9-401(1)(c) by filing a financing statement with the Illinois Secretary of State's office on May 17, 1979. Beil later sold his security interest in Eventide Homes' accounts to the plaintiff J.D. Court. The assignment of that

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[1] Under Title XIX of the Social Security Act, commonly referred to as Medicaid, Congress has authorized federal grants to states for the purpose of enabling each state to furnish medical assistance to eligible persons. Although federally financed, Medicaid programs are administered by the states, subject to the provisions of Title XIX, *see* 42 U.S.C. § 1396 *et seq.*

security interest was recorded with the Illinois Secretary of State on December 21, 1979.[2]

During 1979 and 1980, the taxpayer Eventide Homes provided medical and health care services to Illinois public aid recipients entitling Eventide Homes to receive approximately $33,000 from the Illinois Department of Public Aid. Of this amount, $907.38 was for services rendered to Illinois public aid recipients by Eventide Homes prior to December 1, 1979, with the remainder representing amounts due for the services rendered after December 1, 1979.[3]

Because of Eventide Homes' failure to pay its federal income taxes, the Internal Revenue Service assessed delinquent taxes against Eventide Homes and imposed a

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[2] The record on appeal does not disclose additional facts surrounding the creation and subsequent assignment of the security interest in Eventide Homes' property.

[3] More specifically, the district court gave the following chronological breakdown of the amounts owed Eventide Homes by the Illinois Department of Public Aid:

1979—October	6 through 24	$ 42.40
	6 through 31	204.22
November	1 through 14	81.52
	1 through 30	579.24
December	1 through 11	42.18
	1 through 31	643.45
1980—January	1 through 31	23,468.21
	8 through 21	162.32
	15 through 31	456.29
February	1 through 14	7,192.89

There is some discrepancy regarding the exact total amount owed Eventide Homes by the Illinois Department of Public Aid. The district court stated that the amount owed Eventide totaled $30,593, while the parties stipulated that the amount equaled $32,872.72. The $32,872.72 figure is also arrived at by totalling the court's chronological breakdown of the amounts owed. This discrepancy, however, does not affect our resolution of this appeal since it is undisputed that both the government's tax lien and J.D. Court's security interest exceed the amount owed the taxpayer by the Illinois Department of Public Aid.

federal tax lien on Eventide Homes' property sometime prior to September 1979.[4] On September 17, 1979, the Internal Revenue Service filed in the Kankakee County, Illinois Recorder's Office the first of four notices of tax liens against Eventide Homes' property, in the amount of $3,802.00. The three other notices of tax liens against Eventide Homes were filed in the Kankakee Recorder's Office on the following dates and for the following amounts: (1) October 10, 1979 for $11,084; (2) October 16, 1979 for $10,484; and (3) January 30, 1980 for $43,555.

On January 23, 1980, the Internal Revenue Service levied[5] on the funds then due and owing to Eventide Homes from the Illinois Department of Public Aid for services rendered to public aid recipients. Approximately two weeks later, on February 15, 1980, Eventide Homes (the taxpayer) was placed in receivership. The plaintiff J. D. Court filed this action to enjoin the government from levying on the funds of the Illinois Department of Public Aid owed to Eventide Homes alleging that it is entitled to priority to all of the levied funds by virtue of its position as assignee of the security interest in Eventide Homes'

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[4] The record does not disclose the date of the assessment of the delinquent taxes against Eventide Homes, Inc.

[5] 26 U.S.C. § 6331 states:

"(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

* * *

"(b) Seizure and sale of property.—The term 'levy' as used in this title includes the power of distraint and seizure by any means. . . . In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

"accounts receivable." The levied funds are presently being held in escrow pending resolution of this lawsuit.

In its summary judgment order, the trial court found that the plaintiff J. D. Court's security interest took priority in the taxpayer's accounts receivable which came into existence within forty-five days of the IRS's first filing of a notice of tax lien. The court further determined that the government had priority in the accounts receivable that came into existence after the forty-five days had expired from the filing of the first tax lien pursuant to 26 U.S.C. § 6323(c). The plaintiff J. D. Court appeals from the decision of the district court.

II.

Since one of the parties in this case is the United States holding a lien for unpaid taxes, federal law governs the priority of the conflicting liens on Eventide Homes' accounts receivable. *United States v. Pioneer American Insurance Co.*, 374 U.S. 84 (1963). Specifically, the Federal Tax Lien Act of 1966, 26 U.S.C. §§ 6321-6326 sets forth the rights of private creditors with respect to a federal tax lien.

The Tax Lien Act follows the general rule that a "lien first in time is first in right." In general, a federal tax lien arises (i.e., "attaches")[6] "at the time the [tax] assessment is made," 26 U.S.C. § 6322, and therefore a tax lien normally takes priority over other liens arising

[6] A lien or security interest is said to "attach" at the moment the interest comes into existence. Although the Federal Tax Lien Act of 1966 does not specifically use the term "attach," the term "arise" as used in the Act is considered synonymous with "attach." *See* Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 Harv. L. Rev. 1369, 1373 (1968). In the lexicon of the UCC, a security interest "attaches" when the security interest becomes enforceable against the debtor and third parties. *See* White & Summer, The Law Under the Uniform Commercial Code 901-02 (1980).

subsequent to assessment of the delinquent tax.[7] Section 6323(a)[8] of the Act creates an exception to § 6322's rule that a federal tax lien generally attaches at the time the delinquent tax is assessed; under § 6323(a), when the "holder of a security interest" also claims an interest in property subject to a federal tax lien, the federal tax lien is deemed to have attached when the IRS files a notice of tax lien, rather than when the delinquent tax was first assessed. Thus, the holder of a security interest in a taxpayer's property will prevail against a government tax lien on the same property if the security interest "attaches" and is perfected before the government files its notice of tax lien, *see* Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 Harv. L. Rev. 1369 (1968).

Therefore, to determine the priority between a federal tax lien and a security interest in the same property, it is necessary to determine (1) when the federal tax lien "attaches"; and (2) when the state law security interest "attaches." As we have noted above, § 6323(a) provides that a federal tax lien "attaches" in these circumstances

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[7] 26 U.S.C. § 6322 provides:

"Period of lien

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."

[8] 26 U.S.C. § 6323(a) states:

"Validity and priority against certain persons

"(a) Purchases, holders of security interests, mechanic's lienors, and judgment lien creditors.—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate."

when the notice of tax lien is filed in the appropriate place. However, the Act fails to expressly state when the competing state law security interest is deemed to have "attached." In answering this question, courts have long relied on the judicially created "choateness doctrine." Under the "choateness doctrine," where a security interest arising under state law (such as the plaintiff's) comes into conflict with a federal tax lien, the state law security interest "attaches" only when it becomes "choate." A state law security interest is deemed to be "choate" when all three of the following elements are satisfied: "the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Pioneer American Insurance Co.*, 374 U.S. at 89, quoting *United States v. New Britain*, 347 U.S. 81, 84; W. Plumb, Federal Tax Liens 149-50 (3d Ed. 1972 and Supp. 1974). If this three-part "choateness" test is satisfied at the time the IRS files its notice of tax lien, *or within 45 days thereafter*, the state law security interest takes priority over the competing tax lien. 26 U.S.C. § 6323(c).[9]

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[9] 26 U.S.C. § 6323(c) recites:

"(c) Protection for certain commercial transactions financing agreements, etc.—

(1) In general.—To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which—

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting—

(i) a commercial transaction financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(Footnote continued on following page)

In the instant case, the district court applied the foregoing rules, including the "choateness doctrine," to determine the respective rights of the plaintiff and the United States in Eventide Homes' accounts receivable. The court found that the plaintiff's security interest in the Eventide Homes' accounts receivable did not satisfy the three-part "choateness" test until the property subject to the security interest (i.e., the accounts receivable) actually came into existence—namely, at the moment in time when the Illinois Department of Public Aid became indebted to Eventide Homes for the provision of health and medical services to Illinois public aid recipients. Applying this reasoning, the district court determined that the plaintiff's security interest was "choate" only with regard to the $907.38 of accounts receivable coming into existence within 45 days of the government's filing its first notice of tax lien and thus was only entitled to

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[9] *continued*

(2) Commercial transactions financing agreement.—For purposes of this subsection—

(A) Definition.—The term 'commercial transactions financing agreement' means an agreement (entered into by a person in the course of his trade or business)—

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on qualified property.—The term 'qualified property', when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing."

priority over the competing tax lien to that extent. The court further found that the IRS's tax liens were entitled to priority with regard to any accounts receivable coming into existence thereafter, totalling $31,965.34, since the plaintiff's security interest in those accounts receivable did not become "choate" until more than 45 days after the government filed notice of its tax liens.

In this appeal, the plaintiff first challenges the district court's reliance on the "choateness doctrine." The plaintiff states that the "choateness doctrine" was developed by the federal courts prior to enactment of the Tax Lien Act of 1966 and that the "choateness doctrine" is solely a tax lien concept not embodied in the Uniform Commercial Code. Since the Tax Lien Act was intended to "conform the lien provisions of the internal revenue laws to concepts developed in [the] Uniform Commercial Code," H.R. Rep. No. 1884, 89th Cong., 2d Sess., 35 (1966), the plaintiff concludes that the "choateness doctrine" was abrogated by the Tax Lien Act of 1966.

We disagree with the plaintiff's contention that the Tax Lien Act of 1966 abrogated the "choateness doctrine" since this court, as recently as 1979, recognized the continued viability of the "choateness doctrine" under the Tax Lien Act of 1966. In *Sgro v. United States*, 609 F.2d 1259 (7th Cir. 1979) this court held that a government tax lien took priority over a state law security interest in a taxpayer's accounts receivable, and discussed the "choateness doctrine" as follows:

> "Notwithstanding the attachment of a tax lien upon assessment, [§ 6323(a)] provides that . . . holders of security interests, . . . will prevail if their interest attaches before the Government files appropriate notice. *Attachment occurs at the moment the interest becomes choate*, which is a question of federal law. . . . If 'the identity of the lienor, the property subject to the lien, and the amount of the lien are established' before the Government files notice, those falling within the statutory class will prevail over a prior tax lien."
>
> * * *

> "[A] common way to secure a line of credit is to use one's accounts receivable as collateral. Such a loan may be secured by the outstanding balances in the debtor's accounts receivable at the time the loan is made and by further balances as they become due. . . . Since a subsequently arising balance is not in existence at the time the loan is made, *the resulting lien remains inchoate until the underlying debt becomes due.* . . . [T]he resulting lien remains unprotected by [§ 6323(a)] until it becomes choate and *therefore would be subject to a tax lien filed in the interim.*"

Id. at 1261 (emphasis added) (citations omitted). Similarly, in an earlier case, this court stated:

> "[B]efore determining that a state lien has priority over a federal tax lien under the first in time, first in right rule of § 6323, two questions must be answered in the affirmative: whether a valid lien existed under state law when the federal lien was recorded; *and, if so, whether that lien is 'choate' under federal law.*"

Asher v. United States, 570 F.2d 682, 683 (7th Cir. 1978) (emphasis added). The *Sgro* and *Asher* cases clearly establish that, in determining priority between state law liens and federal tax liens under the Tax Lien Act of 1966, the "choateness doctrine" is recognized in this circuit as a valid legal principle, not abrogated by the Tax Lien Act.[10]

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[10] The plaintiff argues that *Sgro* is no longer good law since the court in *Sgro* relied upon *Texas Oil and Gas Corp. v. United States*, 466 F.2d 1040 (5th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973), a case which the plaintiff contends has been subsequently overruled by the Fifth Circuit. We disagree since it is unclear whether the Fifth Circuit has in fact overruled the *Texas Oil* case and abandoned the "choateness" doctrine. In *Aetna Ins. Co. v. Texas Thermal Industries, Inc.*, 591 F.2d 1035, 1038 (5th Cir. 1979), the Fifth Circuit stated: "We therefore conclude, and hold, that whatever role the 'choateness' rule of

(Footnote continued on following page)

Our conclusion that the "choateness doctrine" has continued validity under the Tax Lien Act is buttressed by the Supreme Court's opinion in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell Foods*, the Court held that the "choateness doctrine" did not apply in determining priority between the government's *contractual* liens arising from federal loan programs and private liens. Although the holding of *Kimbell Foods* does not directly affect our resolution of this case, the Court emphasized the critical distinction between a *contractual* lien arising from a government loan program and a government *tax* lien:

> "That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied. . . . Congress recognized as much over 100 years ago when it authorized creation of federal tax liens. . . . *The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines.*"

Id. at 734 (emphasis added) (citations omitted).

We conclude that the "choateness doctrine" is a valid legal principle in determining the priority between the government's tax lien in Eventide Homes' accounts receivable and the plaintiff's security interest in the same accounts receivable. Having reached this conclusion, we consider only briefly the plaintiff's additional arguments.

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[10] *continued*

federal common law may play in other contexts, it has been supplanted by the provisions of § 6323 with respect to tax lien priority questions as to which that statute provides an unambiguous federal law answer." (footnote omitted). However, the *Aetna Ins.* court did not even cite the *Texas Oil* case, much less expressly overrule it. Moreover, a year after *Aetna Ins.* was decided, the Fifth Circuit in *Rice Inv. Co. v. United States*, 625 F.2d 565 (5th Cir. 1980) extensively relied on *Texas Oil*, referring to it as an example of "federal standards of choateness employed as a tool for statutory interpretation of § 6323 where the collateral was an account receivable." *Id.* at 571 n.19.

The plaintiff argues that its security interest in Eventide Homes' accounts receivable was in fact "choate" prior to September 17, 1979 when the government filed its first notice of tax lien. However, as we indicated in *Sgro*, a security interest in accounts receivable does not become "choate" until the accounts receivable actually come into existence, that is, at the time the services giving rise to the accounts receivable are performed. 609 F.2d at 1261. Thus, the district court correctly determined that the plaintiff had priority only to those accounts receivable arising prior to the government's filing of its notice of tax lien, or within 45 days thereafter. Section 6326(c)(2).[11]

In conclusion, we hold that the district court correctly applied the "choateness doctrine" in determining the respective rights of the parties under the Tax Lien Act of 1966. The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] The plaintiff argues in the alternative that it had a security interest in the taxpayer's "contract rights" to payment from the Department of Public Aid, which was choate when the security agreement was first entered into between Eventide Homes and Beil (the assignor of the security interest to plaintiff). We reject this argument since, under the terms of the taxpayer's certification to participate in the Medicaid Program, the taxpayer had no "contract rights" whatsoever—the taxpayer was not obligated to provide services for public aid recipients and was entitled to receive reimbursement if and when it chose to perform such services. Therefore, the taxpayer had no "contract right" to receive reimbursement from the Department of Public Aid until such time as services were actually performed for public aid recipients.

Opinion by Judge Coffey

JUDGMENT – ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 5, 1983.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JAMES B. MORAN, District Judge*

J. D. COURT, INC., A CORPORATION,

Plaintiff-Appellant,

No. 82-2425 v.

UNITED STATES OF AMERICA, Acting through the DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.
No. 80 C 3043—Judge Harold A. Baker

This Cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable James B. Moran, District Judge of the Northern District of Illinois, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 21, 1983

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JAMES B. MORAN, District Judge*

J. D. COURT, INC., a Corporation,

Plaintiff-Appellant,

No. 82-2425 vs.

UNITED STATES OF AMERICA, Acting through the DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Defendants-Appellees.

In the United States District Court for the
Central District of Illinois, Danville Division.
No. 80 C 2043 —Harold A. Baker, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, J. D. Court, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable James B. Moran, District Judge of the Northern District of Illinois, is sitting by designation.

** The Honorable Harlington Wood, Jr. did not participate in the Petition for Rehearing with Suggestion for Rehearing *en banc.*

No. 83-1000

In the Supreme Court of the United States

OCTOBER TERM, 1983

J.D. COURT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1000

J.D. COURT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding that, under Section 6323 of the Internal Revenue Code, federal tax liens had priority over petitioner's security interest in certain accounts receivable of a delinquent taxpayer. The decision below is correct and does not conflict with that of any other circuit. There is no basis for review by this Court.

1. Petitioner held a security interest in certain property of Eventide Homes, Inc., a nursing home (Pet. App. A2). Petitioner's security interest covered Eventide's "accounts receivable, * * * now or hereafter existing," and was perfected by a proper filing with the Illinois Secretary of State on May 17, 1979 (*id.* at A2-A3). Eventide became delinquent in the payment of its federal taxes. On September 17, 1979, the IRS, pursuant to Section 6321 of the Code,[1] filed

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

the first of several notices of tax lien against Eventide's property (*id.* at A4). The aggregate amount of delinquent taxes covered by these liens was $68,925 (*ibid.*).

Between October 1979 and February 1980, Eventide furnished nursing care to Medicaid recipients (Pet. App. A2). Under the Medicaid program, Eventide was entitled to receive reimbursement in the amount of $33,000 from the Illinois Department of Public Aid (*id.* at A3). Pursuant to Code Section 6331, the IRS issued a notice of levy to the Department, seeking to apply the $33,000 against Eventide's delinquent taxes (*id.* at A3-A4).

Petitioner brought this wrongful levy action under Code Section 7426(a)(1) to test the relative priority of its security interest in, and the government's tax liens on, the $33,000. The validity and priority of federal tax liens is governed by Section 6323. Section 6323(c)(2)(B) provides that, in the case of a "commercial transactions financing agreement," the lender's security interest has priority over a tax lien only if "[the] commercial financing security [is] acquired by the taxpayer before the 46th day after the date of tax lien filing." The government, citing this provision, contended that petitioner's security interest prevailed over the tax liens only to the extent that Eventide had "acquired" the accounts receivable—*i.e.*, earned them by performance of services—within 45 days of September 17, 1979, the tax lien filing date. Petitioner contended that its security interest prevailed over the tax liens as to all of Eventide's accounts receivable, regardless of when Eventide performed its services. The parties stipulated that, of the $33,000 in question, $907 represented amounts due Eventide for services rendered within the 45-day period, the balance representing amounts due for services rendered thereafter (Pet. App. A3-A4).

The district court agreed with the government, and the court of appeals unanimously affirmed (Pet. App. A1-A12). It reasoned that the tax liens were entitled to priority unless petitioner's competing security interest had become "choate" within 45 days of the lien filing date (*id.* at A6-A11). The court of appeals concluded that "a security interest in accounts receivable does not become 'choate' until the accounts receivable actually come into existence, that is, at the time the services giving rise to the accounts receivable are performed" (*id.* at A12, citing *Sgro* v. *United States*, 609 F.2d 1259, 1261 (7th Cir. 1979)). The court accordingly held that petitioner had priority only as to the accounts earned by Eventide's performance within the 45-day period, *i.e.*, only to the extent of $907.

2. The decision below is correct. Although the court of appeals reached its result by applying the "choateness" doctrine, that same result could have been reached—more properly, in our view—by a straightforward application of the statutory language, without resort to notions of "choateness." As other courts have noted, "the 'choateness' rule of federal common law * * * has been supplanted by the provisions of [I.R.C.] § 6323 with respect to tax lien priority questions as to which that statute provides an unambiguous federal law answer." *E.g.*, *Aetna Ins. Co.* v. *Texas Thermal Indus., Inc.*, 591 F.2d 1035, 1038 (5th Cir. 1979). The statute clearly offers "an unambiguous federal law answer" to the lien priority question posed here.

Section 6323(c)(1) generally provides that a federal tax lien, even though properly filed, is invalid "with respect to a security interest which came into existence after [the] tax lien filing," provided that the competing security interest is in "qualified property" covered by a "commercial transactions financing agreement." Section 6323(c)(2)(B) defines "qualified property" as being limited to "commercial financing security acquired by the taxpayer before the 46th day

after the date of [the] tax lien filing." Section 6323(c)(2)(C), as relevant here, defines "commercial financing security" to mean "accounts receivable."[2]

These statutory provisions unambiguously mandate the result reached by the court of appeals. Eventide ("the taxpayer") plainly did not "acquire" its accounts receivable (the "commercial financing security" involved here) until it performed the nursing-care services entitling it to reimbursement. Under Section 6323(c)(2)(B), therefore, the priority of petitioner's security interest, being limited to "qualified property," is limited to the accounts receivable Eventide earned by performing services "before the 46th day after the date of [the] tax lien filing."

The correctness of this analysis is confirmed by Section 6323(h)(1). That Section defines a "security interest" to exist only "at such time [as] the [underlying] property is in existence." The legislative history states that, "[f]or federal tax purposes, a security interest is not considered as existing until the conditions set forth [in Section 6323] are met even though local law may relate a security interest back to an earlier date and even though it might be an effective security interest as of the earlier date under the Uniform Commercial Code." H.R. Rep. 1884, 89th Cong., 2d Sess. 11-12

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[2]Section 6323(c)(2)(C) defines "commercial financing security" also to include "paper of a kind ordinarily arising in commercial transactions." In the courts below, petitioner argued that it had a "commercial financing security" of this sort, on the theory that its security interest covered, not Eventide's accounts receivable, but Eventide's "contract rights" to receive payment from the Illinois Department of Public Aid. See Pet. App. A12 n.11. The court of appeals rejected this argument, holding that Eventide "was not obligated to provide services for public aid recipients," was entitled to payment only "if and when it chose to perform such services," and accordingly "had no 'contract right' to receive reimbursement * * * until such time as services were actually performed" (*ibid.*).

(1966).[3] Congress's intention in enacting Section 6323 was to limit the priority of a competing security interest to property that was in existence at the time of tax lien filing, or that was acquired (*i.e.*, came into existence) within 45 days thereafter. H.R. Rep. 1884, *supra*, at 41-42; S. Rep. 1708, 89th Cong., 2d Sess. 7-8 (1966). Accord, *Texas Oil and Gas Corp.* v. *United States*, 466 F.2d 1040 (5th Cir. 1972), cert. denied, 410 U.S. 929 (1973); *Rice Investment Co.* v. *United States*, 625 F.2d 565 (5th Cir. 1980); *Donald* v. *Madison Industries, Inc.*, 483 F.2d 837 (10th Cir. 1973); *Sgro*, 609 F.2d at 1261. Since Eventide's accounts receivable were clearly not "in existence" until it performed the services requisite to earn them, petitioner's security interest had priority only as to those receivables earned by Eventide's performance within 45 days of the tax lien filing date.

3. Because the language of Section 6323, considered in isolation, unambiguously mandates the result reached by the court of appeals, this case does not require consideration of the question petitioner seeks to present—whether Congress "intend[ed] to curtail or abrogate the application of the federal judicial doctrine of choateness" by enacting Section 6323 (Pet. i, 5-11). Even if the statute could be considered ambiguous, however, the decision below, in invoking that doctrine, would still be correct. In asserting (Pet. 10-11) that there is "confusion * * * as to the viability of the [choateness] doctrine," petitioner relies chiefly on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In that case, this Court held that state law, rather than federal common law with its "choateness" gloss, provides

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[3]In light of this legislative history, petitioner's contention (Pet. 8) that the Uniform Commercial Code, as enacted by Illinois, defines "account" to include "any right to payment * * * for services rendered * * *, whether or not it has been earned by performance," is irrelevant to the lien priority question presented here.

the rule of decision in ascertaining the relative priority of a perfected private security interest and a competing federal lien, where the federal lien arises out of a federal contract. 440 U.S. at 727-729.

The court of appeals correctly held (Pet. App. A9-A11) that the "choateness" doctrine—to the extent resort to it is necessary—continues to have vitality in considering the priority of a federal tax, rather than a federal contractual, lien. This Court in *Kimbell Foods* carefully distinguished between the government's activities as contractor and tax collector, emphasizing that prompt collection of taxes "is vital to the functioning, indeed existence, of government" and that the need for prompt revenue collection justifies "the extraordinary safeguards applied in the tax lien area" (440 U.S. at 734, 735). The Court likewise stressed (*id.* at 718, 735) that the contractual liens involved in *Kimbell Foods* were not subject to any federal statute that "established a priority scheme displacing state law" (*id.* at 735). In the present case, by contrast, Congress has established in Section 6323(c) a specific priority scheme to be used in resolving conflicts between accounts receivable financing arrangements and federal tax liens. To the extent Section 6323's operation is ambiguous, Congress surely intended that its language should be supplemented, not by variegated state-law rules, but by uniform principles derived from federal common law. Nothing in *Kimbell Foods* suggests a different result—indeed, this Court specifically declined (440 U.S. at 735 n.34) to reach the question—and there is no conflict of decision on the issue in the courts of appeals.[4]

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[4]Contrary to petitioner's assertion (Pet. 11), neither *Manalis Finance Co.* v. *United States*, 442 F. Supp. 579 (C.D. Cal. 1977), aff'd, 611 F.2d 1270 (9th Cir. 1980), nor *Consolidated Film Industries* v. *United States*, 403 F. Supp. 1279 (D. Utah 1975), rev'd on other grounds, 547 F.2d 533 (10th Cir. 1976), conflicts with the decision below. Neither case considered the applicability of the "choateness" doctrine where a federal tax lien was concerned.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

DOJ-1984-03

No. 83-1000

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

J. D. COURT, INC., a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY
TO MEMORANDUM IN OPPOSITION

The chief thrust of Respondent's Memorandum in Opposition is an attempt to shift the Court's attention from the Petitioner's arguments on the application of the doctrine of choateness and the plain words of Subsection (a) of Section 6323 to Subsection (c) of that Section. (26 U.S.C., Section 6323) Any straightforward application of Subsection (c), if it applies at all, must result in a decision for the Petitioner.

First of all, Subsection (c) by its own terms applies to security interests "... which came into existence *after* the tax lien filing ...." (Emphasis added) The security interest in question came into existence four months *before* the first tax lien filing. As-

suming, *arguendo*, application of Subsection (c) and an extension of the additional protections afforded lenders thereunder, the Petitioner must prevail under the Respondent's own regulations. The parties stipulated in the trial court that:

> The funds in question were payable to the taxpayer by the Department of Public Aid, pursuant to a written agreement effective during the period of time prior to May 10, 1979 through February 14, 1980. (Common Law Record, *Agreed Statement of Undisputed Facts*, Item 13, pp. 1-2.)

The Respondent promulgated regulations which support the Petitioner's position; Regulation 301.6323(c)-1, promulgated under Section 6323(c) and defining "qualified property" expressly provides:

> *A contract right* (as defined in Paragraph (c)(2)(i) of this Section) *is acquired* by a taxpayer *when the contract is made*. (Emphasis added)

Local law does not distinguish between contract rights and accounts. The Illinois Commercial Code of Illinois, as amended in 1972, eliminated the distinction and provides that "contract rights" are included in the definition of "accounts." See Illinois Code Comments to Section 9-106, Ch. 26, Smith-Hurd Annotated Illinois Statutes, Section 9-106.

While the term of art under local law to secure contract rights is "accounts," the Respondent seeks to bootstrap its arguments by reference to Treasury Regulations referring to "accounts." These are issues not developed in the lower courts. It is clear that state law determines the nature and extent of "property" and "rights to property." *Acquilino v. United States*, 363 U.S. 509 (1960) (cited in Petition).

The existence of an underlying contract by the Treasury's own Regulations relates the existence of the security agreement back to the date of the contract, and in this case, to a date prior to the first tax lien filing, and therefore brings the security interest under Subsection (a), (i.e., Petitioner is holder of a

security interest at time of filing of the tax lien), and not Subsection (c), where a security interest "came into existence *after* tax lien filing."

While the Respondent seems to acknowledge that the doctrine of choateness should give way to the plain terms of the Federal Tax Lien Act, it urges that the courts should apply the Treasury's Regulations and definitions to recast state law concepts and rights in a federal mold and in effect make the doctrine statutory. Petitioner respectfully suggests that commercial expectations, coupled with the congressional deference afforded private liens under the Tax Lien Act, mandate a rejection of not only the doctrine but of any requirement of "performance" in fact or "earned by performance" prior to the 46th day after a Federal Tax Lien filing. By such time, the private lender has already parted with value, and under the Respondent's argument, essentially would result in payment of tax liens by innocent third parties. Subsection (c) of Section 6323 is for the protection of lenders or creditors who part with value *after* the tax lien filing, either innocently or by virtue of a contractual obligation to do so.

Respectfully submitted,

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No. 83-1000

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1983

J. D. COURT, INC., a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING AND MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION INSTANTER

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No. 83-1000

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1983

J. D. COURT, INC., a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING AND MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION INSTANTER

Petitioner, J. D. COURT, INC., petitions this Honorable Court for a rehearing from the Order denying the Petition for Writ of Certiorari, and further moves this Court for leave to file Petitioner's Reply to Memorandum in Opposition Instanter, and in support thereof, says and shows unto the Court as follows:

1. That Respondent's Memorandum in Opposition was received on March 16, 1984.

2. That Petitioner's Reply was printed and served, together with Proof of Service, on March 30, 1984.

3. That by letter dated April 2, 1984, from the Clerk of this Court, the Clerk returned the Reply, explaining that the same was received too late for consideration by the Court in that the Petition was denied on April 2, 1984.

4. That on April 7, 1984, Petitioner received the Order of the Court denying the Petition for Writ of Certiorari.

5. That Petitioner tenders herewith the Reply to Memorandum in Opposition previously served on the Respondent on March 30, 1984, and sent for filing on March 30, 1984.

6. That in support of the Petition for Rehearing, Petitioner incorporates herein by reference all matters and things set forth in the Reply tendered to the Court with this Petition for Rehearing and Motion for Leave.

WHEREFORE, Petitioner prays as follows:

(A) That the Court grant the Motion for Leave to File the Reply to Memorandum in Opposition Instanter;

(B) That the Court rehear Petitioner's Petition for Writ of Certiorari, including a consideration of matters and things set forth in the accompanying Reply;

(C) That the Court allow the Petition and enter an appropriate Order thereon.

Respectfully submitted,

J. D. COURT, INC., Petitioner

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